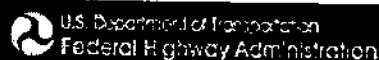


APPENDIX A – FHWA POLICY MEMORANDUMS



FHWA Home | Feedback



U.S. Department of Transportation
Federal Highway Administration

Memorandum

Subject: **INFORMATION: Use of Changeable Message Sign (CMS)**

Date: January 19, 2001

From: Christine M. Johnson
Program Manager, Operations
Director, ITS Joint Program Office

Reply to: HOTM
Attn. of:

To: James A. Cheatham
Division Administrator (HDA-PA)
Harrisburg, Pennsylvania

Thank you for your correspondence regarding the operation of a CMS. Section 2A.07 of the Manual on Uniform Traffic Control Devices (MUTCD) requires that a CMS shall conform to the principles established in the MUTCD related to the use of signs within the right-of-way of all classes of public highways, and to the extent practical, the design and applications prescribed in Sections 6F.02 and 6F.52. Section 2E.21 of the MUTCD specifies that "Changeable message signs shall display pertinent traffic operational and guidance information only, not advertising."

The FHWA supports the use of a CMS as a traffic control device to safely and efficiently manage traffic by informing motorists of roadway conditions and required actions to perform. The appropriate use of a CMS and other types of real-time displays should be limited to managing travel, controlling and diverting traffic, identifying current and anticipated roadway conditions, or regulating access to specific lanes or the entire roadway. A national survey of 26 transportation agencies in 1997, indicated that 77 percent had a policy of displaying messages only when unusual roadway conditions are present, leaving the CMS blank during other times.

The use of a CMS for the display of general public information or other nonessential messages is discouraged. Only essential messages should be displayed on a CMS. As per MUTCD

Section 1A.01 "Guide and information signs are solely for the purpose of traffic control and are not an advertising medium."

The content of a CMS message should be based on requiring the motorist to take an action. However, operational, road condition, and driver safety focused messages are acceptable to be displayed on a CMS. If driver safety focused messages are to be displayed on a CMS, they should be kept current and relate to a specific safety campaign. The period of time that a specific messages is displayed for a safety campaign should be limited to a few weeks. Motorists tend to ignore messages that are displayed for long periods of time.

The improper operation and display of outdated or inaccurate information on a CMS has the potential to adversely affect traffic flow. Inaccurate, incomprehensible, or inappropriate information displayed on a CMS can also cause motorists to question the credibility and ignore all CMS messages. The CMS message should be continuously updated to display the action required by motorists, or to present essential information related to either the current or expected future roadway conditions.

The CMS can convey only a limited amount of information. When there is a need to provide extensive information to travelers, it is critical that the messages displayed are used in conjunction with other traveler information media. Agencies should follow the recommended national CMS practices related to the development, the use of text, and the manner in which messages should be displayed. A list of the key technical references that identify these recommended national practices is attached. Also, attached for your reference is a report that has summarized some of these practices.

If State and local agencies decide to use a CMS, a corresponding commitment must also be made to provide the

necessary resources to effectively manage and operate each device, in-real time in response to changing roadway conditions. Agencies are strongly encouraged to develop and maintain both regional and agency specific policies, standards, and procedures that govern the operation of both permanent and portable CMSs. This framework should provide the direction related to the design, product specifications and standards, implementation, maintenance, operations manual, allowable messages, methodology used to develop messages, standard words and abbreviations, manner to display messages, and conditions or criteria that correspond to the use of specific messages.

If you need any further assistance or information related to CMSs, please contact Mr. Jon Obenberger at (202)368-2221. For information related to the MUTCD, please contact Mr. Ernie Huckaby at (202)336-8064.

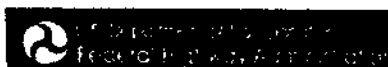
Attachment

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[FHWA Home](#) | [Directives](#) | [Policy Memos](#) | [Feedback](#)



United States Department of Transportation - Federal Highway Administration


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FHWA Policy Memorandums - Operations and Business Unit
Attachement to Memorandum: Use of Changeable Message Signs, January 19, 2001

Recommended National CMS Technical References

VMS & Lane Use Control Signs:

Visibility and Spacing of Lane Control Signs for Freeway Traffic Management	TTI	Rpt No. FHWA-TX-95-1498-1	1994
Effectiveness of CMS Displays in Advance of High-Speed Freeway Lane Closure	TRB	NCHRP Rpt No. 235	1981
Guidelines on Use of CMS	FHWA	Rpt No. FHWA-TS-90-043	1991
CMS	TRB		1979
CMS	TRB	NCHRP Synthesis No. 61	1997
Motorist Interpretation of X and Yellow Diagonal Arrow in Freeway Lane Control Signal Array	TRB	NCHRP Synthesis No. 237 Research Record No. 1495	1995
Yellow Transition Lane Control Signal Symbols for Freeway Traffic Management	TTI	Rpt No. FHWA-TX-97-1498-2	1996
Manual on Real-Time Motorist Information Displays	FHWA	Rpt No. FHWA-1P-88-018	1986
Driver Interpretations of Existing and Potential Lane Control Signal Symbols for Freeway Traffic Management	TTI	FHWA-TX-93-1298-1	1993
Assessment of CMS Technologies	FHWA	Rpt No. FHWA-RD-87-025	1986
Changeable Message Sign Visibility	FHWA	Rpt No. FHWA-RD-94-077	4/1996
CMS A Driver Preference Survey	Ont. Ministry Transport	Rpt No. FHWA-15F 88-03	12/1988
Assessment of CMS Technology	FHWA	Rpt No. FHWA-RD-87-025	1986
Guidelines on the Use & Operation of CMS	TTI	FHWA-TX-92-1232-9	11/1992

Memorandum: Use of Changeable Message Signs, January 19, 2001

This page last modified on February 8, 2001

[FHWA Home](#) | [Feedback](#)
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United States Department of Transportation - Federal Highway Administration



Memorandum

U.S. Department of Transportation
Federal Highway Administration

Subject: INFORMATION: AMBER Alert Use of Changeable Message Sign (CMS)

Date: August 16, 2002

From: Jeffrey F. Paniati /s/ Jeffrey F. Paniati
Acting Associate Administrator for Operations
Acting Director, ITS Joint Program Office

Reply to HOTM-1
Attn. of:

To: Division Administrators

The AMBER (America's Missing: Broadcast Emergency Response) Plan Program is a voluntary program through which emergency alerts are issued to notify the public about abductions of children. The FHWA recognizes the value of the AMBER Plan Program and fully supports the State and local governments' choice to implement this program. These child abduction alerts may be communicated through various means including radio and television stations, highway advisory radio, changeable message signs (CMS), and other media. The purpose of this memorandum is to clarify the FHWA policy on the use of CMS for displaying AMBER Alert child abduction-related messages. Under certain circumstances, using CMS to display child abduction messages as part of an AMBER Plan Program has been determined to be consistent with our current policy governing the use of CMS and the type of messages that are displayed.

The AMBER Plan Program encourages use of the most effective methods to communicate with the public on behalf of abducted children. We note that CMS is not always the most effective or safest method to disseminate information related to child abductions. The CMS can convey only a limited amount of information to motorists. When there is a need to provide extensive information to motorists, it is critical that other types of traveler information based media (e.g., 511, highway advisory radio, web sites, commercial radio) be used, or that the messages displayed on a CMS supplement these other media. We continue to discourage the display of general public information or other nonessential messages on CMS.

As stated in the January 19, 2001, Policy Memorandum, "INFORMATION: Use of Changeable Message Sign (CMS)" (www.fhwa.dot.gov/legregs/directives/policy/pame.htm), FHWA supports the use of a CMS as a traffic control device to safely and efficiently manage traffic by informing motorists of roadway conditions and required actions to perform. It is FHWA policy that the appropriate use of a CMS and other types of real-time displays should be limited to managing travel, controlling and diverting traffic, identifying current and anticipated roadway conditions, or regulating access to specific lanes or the entire roadway. The memorandum does, however, provide for limited use of CMS for driver safety-focused messages. If driver safety-focused messages are to be displayed on a CMS, they should be kept current, be of short duration, and relate to a specific safety campaign.

If public agencies decide to display AMBER Alert or child abduction messages on a CMS, FHWA has determined that this application is acceptable only if (A) it is part of a well-established local AMBER Plan Program, and (B) public agencies have developed a formal policy that governs the operation and messages that are displayed on CMS.

(A) A local AMBER Plan Program would include written criteria for issuing and calling off an AMBER Alert, procedures on issues to coordinate with local agencies and other interests, and conforms to the recommendations of the national program (www.missingkids.org). Specific criteria for issuing an Alert and the associated procedures may include:

1. Confirmation that a child has been abducted,
2. Belief that the circumstances surrounding the abduction indicate that the child is in danger of serious bodily harm or death, and
3. Enough descriptive information about the child, abductor, and/or suspect's vehicle to believe an immediate broadcast alert will help.

(B) The formal public agency policy and procedures relating to displaying AMBER Alert or child abduction messages on CMS must address the following issues:

1. The criteria under which CMS will be used for AMBER Alerts.
2. Clear identification of the law enforcement agency responsible for issuing the alert (e.g., State police, local police department, etc.).
3. Agencies, interests, and persons to be contacted and information to be disseminated to initiate or call off an AMBER Alert.
4. Specific recognition that traffic messages, such as lane closures, fog alerts, detours, etc., are the highest priority, and circumstances under which the AMBER Alert message could or could not be displayed.
5. Length of time to display the message (should be of short duration, typically a few hours).

(Note: 4 and 5 should be defined in cooperation with the responsible law enforcement agency based on the specific circumstances of the abduction.)

6. Geographic area over which the information is to be displayed (should be limited to a reasonable search distance that is reachable within a few hours).
7. Circumstances that would cause the discontinuation of use of the CMS if the AMBER Alert message creates an adverse traffic impact such as queues, markedly slowing of traffic, etc.
8. Format and content of the messages to be displayed. Agencies should follow the recommended national CMS practices related to the development, use of text, manner in which messages should be displayed, and how CMS are operated.

A list of references that identify these recommended national practices is attached. Additionally, the 25 agencies in the TMC Pooled Fund Study will be publishing this fall a technical reference that will provide guidance on agency policies and procedures governing CMS operation, how to develop and display messages, and how to operate CMS. Additional information about the TMC Pooled Fund Study and this project is available at: <http://tmcps.ops.fhwa.dot.gov>.

Finally, questions have surfaced on the linkage between this CMS policy and the Manual on Uniform Traffic Control Devices (MUTCD). Section 2A.07 of the MUTCD states that a CMS shall conform to the principles established in the MUTCD related to the use of signs within the right-of-way of all classes of public highways, and to the extent practical, the design and applications prescribed in Sections 2E.21 (General: Changeable Message Signs), 6F.02 (Temporary Traffic Control Zone Devices: General Characteristics of Signs), and 6F.52 (Temporary Traffic Control Zone Devices: Portable Changeable Message Signs). Through the Notice of Proposed Amendment (NPA) process FHWA is proposing revisions to the MUTCD language regarding use of driver safety-focused messages.

Questions regarding this policy statement should be directed to Mr. Jeff Lindley at (202) 366-6726. For further information regarding message content, display, and CMS operation, please contact Mr. Jon Obenberger at (202) 366-2221, or for information on the MUTCD contact Mr. Ernie Huckaby at (202)



U.S. Department of Transportation
Federal Highway Administration

FHWA Home | Feedback



U.S. Department of Transportation
Federal Highway Administration

Memorandum

Subject: Legal Opinion on the Erection of Billboards on
The Right-of-Way of an Interstate Highway by a State

Date: DEC 19, 1996

From: Chief Counsel

Reply to: HCC-31
Attn. of:

To: Mr. Dennis Judycki (HST-1)
Mr. Thomas Ptak (HPD-1)

You have asked us to review the Federal implications of a decision by the New Jersey Turnpike Authority to erect 12 double-sided billboards in the right-of-way of the New Jersey Turnpike on the portion of the turnpike north of Edison, New Jersey. The billboards would be leased to advertisers in the hopes of raising up to \$1.5 million for the Authority. The billboards would be placed in the Turnpike right-of-way in towns that would not oppose them. The New Jersey Turnpike is either signed as Interstate 95 and/or designated as part of the National Highway System, although there were few Federal funds used in its construction. The New Jersey Turnpike Authority is a public entity, operating separately from the New Jersey Department of Transportation. This memorandum will examine if the proposal to erect billboards in the Turnpike's right-of-way violates any Federal requirement or Federal Highway Administration (FHWA) policy. As will be shown below, the proposal appears to violate several Federal statutes and regulations. After discussing the laws dealing with advertising signs on the right-of-way and how the proposal would violate them, the memorandum will then address the legal consequences.

Signs on rights-of-way are generally governed by 23 U.S.C. §109(d) which provides that:

On any highway project in which Federal funds hereafter participate...the location, form and character of informational, regulatory and warning signs, curb and pavement or other markings, and traffic signals installed or placed by any public authority or other agency, shall be subject to the approval of the State highway department with the concurrence of the Secretary, who is directed to concur only in such installations as will promote the safe and efficient utilization of the highways. (emphasis added)

The guidelines are made applicable to all public roads, regardless of Federal funding, under 23 U.S.C. § 402(a). The Federal Highway Administrator has been delegated the authority to make such approvals under 49 C.F.R. 1.48(b)(8). His decision as to which signs "promote the safe and efficient utilization of the highways" can only be overturned on the stringent "arbitrary or capricious" standard of the Administrative Procedure Act. See *State of Nebraska, Department of Roads v. Tiemann*, 510 F.2d 446 (8th Cir. 1975). Obviously, the phrase "such installations as will promote the safe and efficient utilization of the highways" can encompass many things. The use of the adverb "only" in § 109(d), however, suggests that the section be read narrowly. Under a narrow reading, a sign must further the goal of safe and efficient use of the highway or it should not be approved. Agencies are accorded great deference in the interpretation they give to the statutes they are entrusted to enforce "unless that interpretation is inconsistent with a clearly expressed congressional intent." *INS v. Cardoza-Fonesca*, 480 U.S. 421, 454 (1987). As will be shown below, the congressional intent is clearly against allowing billboards upon the rights-of-way of public highways.

Pursuant to §§ 109(d) and 402(a), the FHWA promulgated the Manual on Uniform Traffic Control Devices (MUTCD) to provide national standards for traffic control devices on all highways open to the public. 23 C.F.R. § 655.605(a) provides:

National MUTCD. The MUTCD approved by the Federal Highway Administrator is the national standard for all traffic control devices installed on any street, highway, or bicycle trail open to public travel in accordance with 23 U.S.C. §§ 109(d) and 402(a).

The MUTCD does not have a formal definition of "sign." In the Introduction, the MUTCD does say that "[t]raffic

control devices are all signs, signals, markings, and devices placed on, over, or adjacent to a street or highway by authority of a public body or official having jurisdiction to regulate, warn, or guide traffic." (MUTCD, 1988 ed., p. vii.) The MUTCD does not formally define "traffic control devices" but does give a statement as to their purpose:

... Traffic control devices are used to direct and assist vehicle operators in the guidance and navigation tasks required to traverse safely any facility open to public travel. Guide and information signs are solely for the purpose of traffic control and are not an advertising medium. (MUTCD, 1988 ed. Section 1A-1.)

The MUTCD divides traffic signs into three main categories: regulatory, warning, and guide. Regulatory signs "inform highway users of traffic laws or regulations and indicate the applicability of legal requirements that would not otherwise be apparent." (MUTCD, 1988 ed. Section 2B-1.) Warning signs are used "to warn traffic of existing or potentially hazardous conditions on or adjacent to a highway or street." (MUTCD, 1988 ed. Section 2C-1.) Guide signs, in general, are "essential to vehicle operators along streets and highways, to inform them of interesting routes, to direct them to cities, town, villages, or other important destinations, to identify nearby rivers and streams, parks, forests, and historical sites, and generally to give such information as will help them along their way in the most simple, direct manner possible." (MUTCD, 1988 ed. Section 2D-2.)

The MUTCD does permit limited advertising in two categories of guide signs: the "Motorist Service Signing" and "Tourist Oriented Directional Signs (TODS)." Motorist Service signs, more commonly known as "LOGO" signs, are large signs with smaller company logo signs upon them. Their purpose is to provide travelers with information about nearby essential motorist

Services. The other permitted signs that can carry advertising are TODS; these are special signs in the interest of travelers and are limited to rural conventional roads. These two categories of commercial signs are permitted by MUTCD because they are expressly provided for in Federal statute. See 23 U.S.C. §131(f) and (i).

Subsection (f) provides for the erection within the rights-of-way of informational signs which give "specific information in the interest of the traveling public." From the House Report on the HBA we learn what the Congress intended with the inclusion of subsection (f):

"This subsection (f) deals with the signs a motorist will see, in either direction, as he travels the Interstate System, to advise him of the kind of accommodations- motels, hotels, gasoline stations, and restaurants-that may be available at the next interchange. The committee felt strongly about the need for adequate information for motorists" H.R. Rep. No. 1084, 89th Cong., 1st Sess. (1965) reprinted in 1065 U.S.C.C.A.N. 3715.

Subsection (i) allows states to permit advertising pamphlets at safety rest areas. In addition, with FHWA approval, a state may establish "travel information systems within rights-of-way for the purpose of informing the public of places of interest within the state and providing such other information as a state may consider desirable." In keeping with the apparent intent of Congress, the FHWA regulations for roadside development, found at 23 C.F.R. part 752, essentially envisioned information systems at rest areas.

Neither of these categories of signs are advertising signs like the ones proposed in New Jersey. Signs erected solely as advertising signs do not fit any of the accepted categories of the MUTCD. They certainly do not regulate or warn motorists. Nor do they "give such information as will help them [motorists] along their way in the most simple, direct manner possible." The sole purpose of the signs proposed here is commercial advertising. They would not meet the tight size and content standards established for LOGO and TODS signs. They are not concerned with promoting "the safe and efficient utilization of the highways," which is the congressional mandate to the Secretary at 23 U.S.C. § 109. Advertising signs on the right-of-way therefore are not approved signs under the MUTCD.

Under 23 C.F.R. § 1.23(b), rights-of-way of public highways must be devoted "exclusively to public highway purposes" unless the Administrator of the FHWA gives his approval to the use of the right-of-way for any other use. To date, the Administrator has not given his approval to the placement of any billboards in the right-of-way of a public highway.

Indeed, a decision to permit advertising signs would seem to be contrary to the policies of the Highway Beautification Act (HBA), 23 U.S.C. § 131. The HBA generally bans signs, with some exceptions (not discussed in this memorandum), along the rights-of-way of the Interstate, Federal-

aid primary highway systems (which includes the National Highway System). The New Jersey Turnpike is an Interstate highway and also a part of the National Highway System, so the HBA is Applicable to it. 23 U.S.C. § 131(t).

While the bulk of the HBA focuses on signs adjacent to, rather than on the right-of-way, it seems clear to us that the Congress never intended to broadly allow commercial signs on the right-of-way. Under the maxim of statutory construction, "expressio unius est exclusio alterius" ["the expression of one thing is the exclusion of another"], the fact that the HBA allows only these exceptions means that other forms of advertising on the right-of-way are forbidden. See Sutherland Statutory Construction § 47.23 (5th Edition). It would be ludicrous to suggest that Congress, while mandating the States to control advertising along thousands of miles of Interstate And Federal-aid primary highways, would also allow the States to erect billboards on the rights-of-way of those same thousands of miles of highway.

We recognize that the signs at issue here would be erected under the auspices of the New Jersey Turnpike, not the New Jersey Department of Transportation. Nevertheless, any violations of Federal requirement could be imposed on funds generally flowing from FHWA to the State. Under 23 U.S.C. § 302, the FHWA deals with NJDOT and not directly with a turnpike authority. The Administrator's authority to sanction a state for failure to comply with MUTCD standards for informational signs was the subject of the *Nebraska v. Tiemann* case, cited above. The State had been testing a format for motorist information signs which FHWA had abandoned. The failure of the State to remove these commercial information signs resulted in FHWA penalizing Nebraska. The case centered on the authority of the FHWA to impose a penalty for Noncompliance with § 109(d), and the court upheld the FHWA's sanction imposed under authority of 23 C.F.R. § 1.36.

In conclusion, we believe that FHWA clearly has the authority to withhold funds from a State that allows the erection of billboards on rights-of-way, an act which constitutes a failure to comply with Title 23 requirements. Further, we believe that such an action by FHWA would be consistent with established policies for administering the MUTCD and would further the statutory policies of the HBA.



Jerry L. Mahan

For information related to the MUTCD, please contact Mr. Ernie Huckaby at (202) 336-9064.

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